

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)

NTCH, Inc. for and on behalf)
of its Operating Subsidiaries,)

Complainant,)

v.)

Cellco Partnership dba Verizon Wireless)
and its Operating Subsidiaries,)

Defendant.)

EB Docket No. 14-212
File No. EB-13-MD-006

INITIAL BRIEF OF NTCH, INC.

Donald J. Evans
Jonathan R. Markman

Attorneys for NTCH, Inc.

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, Suite 1100
Arlington, VA 22209
703-812-0400

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SUMMARY

This Initial Brief of NTCH, Inc. describes the parties and summarizes the history of their negotiations and sets forth their best and final offers, which were rejected. It then lays out the legal framework for the FCC's evaluation of the complaint, including the relevant statutory obligations to provide just and reasonable rates and not unreasonably discriminatory rates for Title II services, and the temporarily prevailing "commercially reasonable" standard for data roaming rates. The relevance of costs to the reasonableness analysis is discussed. The relevance of rates that unreasonably restrain trade is noted.

The brief then presents proposed factual findings regarding the current state of competition in the wireless marketplace and the unique and irreplaceable importance of Verizon as a roaming partner with reasonable rates. The reasonableness of Verizon's roaming rate offer to NTCH is then compared against the rates offered to retail customers and MVNOs for the same bundles of services. The Verizon offer is also compared against an independent analysis of the costs of producing a gigabyte of data as a surrogate for cost data from Verizon. In each case, Verizon's offered rate is [REDACTED] the relevant benchmark.

The offered rate is then compared against the rates Verizon offers to other wireless carriers for similar services. Since the rate offered to NTCH is [REDACTED], the rate is presumptively unreasonably discriminatory. NTCH is entitled to the [REDACTED] rate.

The brief then addresses the criteria cited in the Data Roaming Order for evaluating the commercial reasonableness of rates. That evaluation leads to a clear finding that Verizon's data roaming rates are unreasonable.

Finally, the effect of Verizon's pricing practices in restraining trade is analyzed.

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INITIAL BRIEF OF NTCH, INC.

This Initial Brief is submitted in support of NTCH, Inc.'s ("NTCH's") Complaint in the above captioned proceeding.

I. Background

A. The Parties

Complainant NTCH is a Delaware corporation headquartered at 5594 S. Ft. Apache Rd., Suite 100, Las Vegas, NV 89148. Its operating subsidiaries PTA-FLA, Inc., NTCH West Tenn, Inc. and NTCH-WA, Inc. provide or plan to provide mobile voice and data common carrier service predominantly in South Carolina, Tennessee and Washington state. The NTCH family of companies holds licenses to provide CMRS service in Missouri, Arizona, Minnesota, New Mexico, Texas and Idaho, with service to be provided by a regional operating subsidiary. In order to offer a comprehensive,

competitive and attractive mobile communications service to its customers in the limited areas where it offers or will offer its own facilities-based service, NTCH must have access to just and reasonable roaming rates from roaming partners. In particular, a reasonable roaming rate from Defendant is essential.

Defendant Cellco Partnership, a Delaware general partnership, and its operating subsidiaries do business under the name Verizon Wireless (Verizon). Verizon has been recognized by the Commission as a nationwide provider of mobile communications services. *Policies Regarding Mobile Spectrum Holdings, FCC 15-79, rel, 8/15/2015*. It advertises and provides wireless service across a substantial portion of the populated areas of the continental United States. It is by far the largest provider of wireless service using the CDMA interface, which is the interface used by NTCH.

B. Current and Proposed Roaming Terms

NTCH, on behalf of itself and its subsidiaries, currently has a roaming agreement with Verizon that dates back to May 16, 2006. The agreement specifies a roaming rate that is [REDACTED]

[REDACTED]. [REDACTED]

[REDACTED] These rates are grossly out of line with current roaming rates between carriers who lack Verizon's market dominance, which are as little as zero where bill and keep applies, or \$0.01 or less per minute for voice. The toll rate bears no relationship to rates charged in other contexts for toll voice service, which are often at or near zero.¹ Verizon's roaming rate to NTCH

¹ See, Steinmann Declaration, p. 4.

is so high as to make it financially impossible for any NTCH customer to roam on Verizon automatically, because the cost to NTCH would be so excessive. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Accordingly, in the fall of 2011, NTCH initiated negotiation of a new roaming agreement with Verizon. The outcome of those negotiations and a subsequent FCC-supervised mediation was the following rates offered by Verizon:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

NTCH has proposed the following rates:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Neither party's terms were accepted by the other.

II. Framework for FCC Decision

A. Voice Roaming

Before assessing the lawfulness of the rates offered by Verizon, we must first lay out the regulatory framework for judging such rates. The Commission has formally declared voice roaming to be a common carrier service covered by the full panoply of rights and obligations that apply to telecom service offerings under the Communications Act, including Sections 201, 202, 203 and 208. *Interconnection and Resale Obligations, Second Report and Order*, 11 FCC Rcd 9462 at ¶ 10 (1996). "When a reasonable request is made by a technologically compatible CMRS carrier, a host CMRS carrier is obligated under Sections 332(c)(1)(B) and 201(a) to provide automatic roaming on a just, reasonable, and non-discriminatory basis to the requesting carrier outside of the requesting carrier's home market."²

Just and reasonable rates. Section 201 of the Communications Act establishes the just and reasonable rate obligation:

All charges, practices, classifications, and regulations for and in connection with such communications service [offered by a common carrier], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust and unreasonable is hereby declared to be unlawful.

² *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers, WT Docket No. 05-265, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 15817 (2007) at 15826 ¶ 23.

The justness and reasonableness of voice rates must be evaluated in the light of eighty years of Commission precedent. Those precedents have consistently used the cost of providing a given service, plus a reasonable rate of return, as the guiding benchmark. *See, e.g., General Communications, Inc. v. Alascom, Inc.*, 64 RR 2d 1137, 1140, 1144 (1988) ("The Communications Act does not specify a particular method for carriers to use to establish just, reasonable and non-discriminatory charges that do not create any undue preference... These statutory provisions have, however, been interpreted to require generally that carriers establish rates that are cost-related.")³

Verizon has argued that the Commission has, *sub silentio*, abandoned these 80 years of governing case law in assessing roaming rates, but it cites not a single authority to support that perverse proposition.⁴ To be sure, the FCC has avoided imposing

³ Cost is, and always has been, a core component of determining what is a just and reasonable rate. *See, e.g., In the Matter of Rates for Interstate Inmate Calling Services (ICS II)*, 28 FCC Rcd 15927, 15928 at ¶ 3 (2013) (noting that "To be just and reasonable [under Section 201], rates must be related to the cost of providing service."); *In the Matter of Rates for Interstate Inmate Calling Services (ICS I)*, 2013 FCC Lexis 4028 at ¶ 45 (2013) (noting that "the just and reasonable rates required by Sections 201 and 202...must ordinarily be cost-based"); *In the Matter of Petition of ACS of Anchorage*, 22 FCC Rcd. 16304, 16330 n. 155 (2007) (noting that "If ACS's rates are challenged, it may be necessary for the Commission to consider its costs and earnings in assessing the reasonableness of its rates."); *In the Matter of Application by Verizon New England*, 17 FCC Rcd 7625, 7632 at ¶ 13 (2002) ("determination of the just and reasonable rates for network elements shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit."); *Communications, Inc. v. Alascom, Inc.*, 64 RR 2d 1137, 1140, 1144 (1988).; *In the Matter of Investigation of Special Access Tariffs*, 4 FCC Rcd. 4797, 4800 at ¶ 32 (1988) (noting that, under Section 201 of the Act, "Costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates"); *In the Matter of MTS and WATS*, 97 F.C.C. 2d 682, 687 at ¶ 10 (1995) ("Preeminent among these principles is the conclusion that actual costs of providing service underlie the statutory requirement that rates be just, reasonable, and nondiscriminatory.") (internal quotations omitted).

⁴ Verizon Answer Statement of Facts, p. 9-12.

industry-wide “price caps” on roaming rates and has eschewed “prescribing” rates,⁵ but it has consistently invited carriers who are aggrieved by roaming rates to file a complaint under Section 208 and get a ruling.⁶

Here, the Market Disputes Resolution Division has rejected NTCH’s motions to discover Verizon’s actual costs in order to conduct the required reasonableness assessment.⁷ However, it did so solely on the basis of *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 25 FCC Rcd 4181 (2010) (*Automatic Roaming Order*). That order deals exclusively with the circumstances of when a carrier must offer automatic roaming to another carrier. It does not address at all the justness or reasonableness of the rates offered. It is therefore no surprise that the Commission did not identify carrier costs as one of the items that would be considered, as they are wholly inapplicable in that context. But the provision of automatic roaming has nothing to do with the relevance of costs in the context of establishing just and reasonable rates. There is no reason why the justness and reasonableness of a CMRS carrier’s roaming rates should be evaluated differently from any other common carrier’s rates.

⁵ The Commission did indicate in 2007 that the “better course” is that the “rates individual carriers pay for automatic roaming services be determined in the marketplace through negotiations between the carriers, subject to the statutory requirement that any rates charged be reasonable and non-discriminatory.” *Reexamination of Roaming Obligations of CMRS Providers and Other Providers of Mobile Data Services*, 22 FCC Rcd 15817, 15833 (2007) (emphasis added). Thus, while the Commission has very clearly enunciated its preference for negotiation over ex ante rate regulation, it has never renounced the fundamental obligation that rates be just and reasonable as required by Section 201 of the Act.

⁶ See, e.g., *Regulatory Treatment of Mobile Services*, 9 FCC Rcd 1411, ¶ 210 (1994).

⁷ That order is under interlocutory review.

In the absence of actual cost data, NTCH will of necessity rely on proxies for cost data – retail rates and MVNO rates – which the Wireless Bureau has declared in the context of data roaming are valid bases for assessment of commercial reasonableness,⁸ and generic data calculating the cost of delivering a GB of data.

Verizon has also argued that the proper measure of reasonableness is the rate it is charging, or being charged by, other carriers for roaming.⁹ This is a false measure. As is demonstrated below, Verizon so dominates the CDMA market that it has what amounts to monopoly power to charge any rate it wishes. It has the widest coverage nationwide of any other CDMA carrier, which means that it has the least need to enter into roaming agreements with other carriers. In those few cases where it actually needs a roaming agreement with other carriers, that commercial reality tempers its normal high rates. Simply stated, the fact that Verizon has the economic power to, and does, consistently gouge carriers across the board does not logically establish the reasonableness of its rates; it just establishes that these rates are *consistently* unreasonable when weighed against correct standard: cost-plus-reasonable-return.

Not unreasonably discriminatory rates. The statutory obligation for non-discriminatory rates is found in Section 202 of the Act:

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities or services for, or in connection with, communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality....

⁸ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, DA 14-1865, rel. Dec. 18, 2014(*T-Mobile Declaratory Ruling*”).

⁹ Verizon Answer Legal Analysis, p. 3.

A rate or term is unjustly or unreasonably discriminatory when it differs from a rate offered to another customer or carrier without a valid basis for the distinction.¹⁰

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Verizon has offered no factual explanation whatsoever in this record for how or why the rate offered to one carrier should be different from the rate offered to another, other than for its LRA arrangements. Nor has it explained why MVNOs, who are offered services functionally indistinguishable from the roaming services offered to NTCH, should receive [REDACTED]. Since the burden is always on the carrier to justify the reasonableness of discriminatory pricing,¹¹ and Verizon has not even attempted to meet that burden, little analysis is required here to make finding of unlawful discrimination.

¹⁰ *Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Service Providers*, 13 FCC Rcd 16857 at 14 (1998); *In the Matter of Competition in the Interstate Interexchange Marketplace*, 5 FCC Rcd 2627 at 137 (1990); *In the Matter of AT&T Communications*, 103 FCC 2d 157 at 15 (1985).

¹¹ See, e.g. *MCI Telecom. Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990) (“the carrier offering [the discriminatory prices] has the burden of justifying the price disparity as reasonable”); *In the Matter of William G. Bowles v. United Telephone Company of Missouri*, 12 FCC Rcd 9840, 9852 (1997) (“Once the like services and discrimination are established, the burden shifts to the defendant carrier to show that the discrimination is not unreasonable.”).

B. Data Roaming

When this case began, the Commission had deemed data roaming to be a non-common carrier information service subject to a somewhat different measure of reasonableness than that applicable to voice roaming. NTCH challenged that categorization as erroneous. In the intervening years since this case was filed, the full Commission has caught up to NTCH's view of things and has re-categorized data roaming as a telecommunications service subject to Title II.¹² However, the Commission went on to forbear from application of Sections 201 and 202 of the Act to data roaming, applying the same standards to data roaming under the *new* regulatory paradigm as it had previously applied to such roaming when it was not a Title II service. *Id.* at Paras. 523-526. Because Section 332(c) of the Act explicitly bars the Commission from forbearing from Sections 201 and 202 of the Act as they apply to CMRS providers, the Commission's forbearance action was plainly unlawful. NTCH has filed a Petition for Reconsideration of the *Net Neutrality Order* challenging this ruling¹³ and is confident that the ruling will be reversed.

The *Data Roaming Order* adopted in 2011¹⁴ declared that data roaming rates must be "commercially reasonable" but need not be non-discriminatory. For purposes of this Brief, NTCH will demonstrate that Verizon's offered data roaming rates are neither reasonable nor commercially reasonable (to the extent there is a difference) and are also

¹² *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24, rel. March 12, 2015 ("Net Neutrality Order").

¹³ Petition for Reconsideration of NTCH, Inc. et al., GN Docket 14-28, May 13, 2015.

¹⁴ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, 26 FCC Rcd 5411 (2011) (*Data Roaming Order*).

unreasonably discriminatory. The *Data Roaming Order* set forth a non-exhaustive list of factors to use in assessing commercial reasonableness which will be applied here, in addition to the further guidance found in the *T-Mobile Declaratory Ruling* regarding the relevance of retail and wholesale, roaming rates in assessing commercial reasonableness.

Restraint of trade. The Commission explicitly indicated in the *Data Roaming Order* that “conduct that unreasonably restrains trade, however, is not commercially reasonable.” (*Id.* at Para. 85). Competition in the marketplace is restrained by selling access to its network to some providers below the price it charges others in order to gain or solidify market dominance, conduct which may be illegal under the Robinson-Patman Price Discrimination Act.¹⁵ In addition, to the extent that Verizon is selling access to its networks to MVNO carriers at low prices with the intent of undercutting the ability of other competitors to remain in business and compete, then it is engaging in highly illegal conduct known as “predatory pricing.”¹⁶ NTCH will show that the roaming rates charged by Verizon have a direct adverse effect on competition that constitutes an unreasonable restraint of trade in several respects and is therefore unlawful.

¹⁵ 15 U.S.C. § 13 (“It shall be unlawful for any person...to discriminate in price between different purchasers of commodities of like grade and quality...where the effect of discrimination may be substantially to lessen competition or tend to create a monopoly.”) See e.g., *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993) (“A business [may not] price its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market”); *US v. National Dairy Products Corp.*, 372 U.S. 29, 29 (1963) (describing the Robinson-Patman Act as “making it a crime to sell goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor”).

¹⁶ See *Competition and Monopoly: Single-Firm Conduct under Section 2 of the Sherman Act*, U.S. Department of Justice, 2008, Chapter 4 “Price Predation”. See also, *Brooke Group*, 509 U.S. 209 (1993).

III. Proposed Findings of Fact

A. Access to Verizon's Network is Necessary to Permit Ubiquitous CDMA Roaming

The Commission made the provision of roaming services between cellular carriers mandatory from the very inception of the cellular service. The nationwide cellular system has always envisioned and required cellular service to be ubiquitous and available to subscribers roaming outside their home service areas. *An Inquiry into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems*, CC Docket No. 79-318, Report and Order, 86 FCC 2d 469 at ¶ 75 (1981). At that time, the cellular marketplace was expected to be characterized by broad diffusion of ownership among the various Regional Bell Operating Companies and independent telephone companies on the one hand, and dozens – later hundreds – of non-wireline providers on the other. Because of the diffusion of ownership and the fact that no carrier could offer service directly to its own customers in the large parts of the country that were outside its own licensed territory, it was in the interest of all carriers to have mutually agreeable and reciprocal roaming arrangements that would permit their customers to roam when they were not in their home markets.

This diversity of cellular ownership is no longer the case. Most of the small local or regional carriers have been swallowed by AT&T and Verizon. MetroPCS and Cricket, which until recently provided viable CDMA roaming options in some major markets, gave up as independent operators and merged with T-Mobile and AT&T, respectively. Both are in the process of converting their networks from CDMA to GSM. NTCH had fair and reasonable (at the time) roaming agreements with both MetroPCS and Cricket.

In addition, Allied, which operated a good portion of the former ALLTEL CDMA network in South Carolina, has been sold to AT&T. After a brief transition period, its CDMA network will also be converted to GSM. With the loss of Cricket, Allied, and MetroPCS, the customers of remaining CDMA carriers are left with only one viable national roaming option: Verizon.

Carriers like NTCH, which are also CDMA-based, must, of practical necessity, have roaming agreements with Verizon. Verizon's national footprint far exceeds that of any other CDMA carrier, which means that in many parts of the country there is no realistic alternative to Verizon as a roaming partner for NTCH's customers.

Verizon has pointed to Sprint as a CDMA option,¹⁷ but Sprint's network is not nearly as broad or as deep as Verizon's. Sprint's network, though ostensibly national in scope, covers only about half the land area of the Verizon's network. (A copy of Verizon's self-publicized network coverage area was provided by NTCH as Exhibit B to its Complaint.) In NTCH's Tennessee and Washington markets, for example, Sprint's coverage is equal to or *less* far-reaching than NTCH's own coverage area, so it can provide no assistance to customers who need to roam outside NTCH's home coverage area within these states. In South Carolina, not only is Sprint's coverage area limited (see Ex. C to NTCH Amended Complaint),¹⁸ but calls originating on NTCH's or Sprint's network are dropped when a customer needs to roam on the other network, and often the call cannot then be easily re-initiated.¹⁹

¹⁷ Verizon Answer Statement of Facts, p. 8.

¹⁸ Sprint's coverage area in South Carolina was calculated by NTCH to be about 15,165 sq. miles in South Carolina, about 16,500 sq. miles less than VZW's.

¹⁹ Steinman Declaration, p. 2.

Because of the enormity and ubiquity of Verizon's spectrum holdings, the lack of viable alternatives, and its limited need to roam with other carriers on account of its own nationwide footprint, Verizon dominates the CDMA roaming market. It has every incentive to make its smaller competitors less attractive to customers by reducing those customers' ability to roam if they do not sign on as Verizon customers. Were it not for Section 20.12 of the Commission's rules requiring it to provide roaming, Verizon would have no reason to enter into most of its roaming agreements at all and presumably would ordinarily not do so. An exception to this rule is the roaming agreements VZW has with small rural carriers under its LRA program. There, it does cooperate with entities that are heavily subsidized to build out very expensive rural areas. In those remote areas where Verizon actually needs a roaming partner and the roaming rate is reciprocal, the roaming partner LRA [REDACTED]

[REDACTED]

[REDACTED]

The lack of access to roaming on just and reasonable terms puts Verizon's competitors at a significant competitive disadvantage because they cannot offer the ubiquitous wireless service that Verizon can offer based on its nationwide footprint. Verizon's refusal to offer just and reasonable roaming rates contributes to and exacerbates the market dominance that Verizon already enjoys and prevents the emergence of competition using CDMA technology against the four nationwide carriers.

The Commission recognized three years ago that Verizon has a dominating position in the mobile communications marketplace.²⁰ The Commission found that, as of the summer of 2012, Verizon would have an average of 107.5 MHz of spectrum nationwide, outstripping its other national competitors by a wide margin.²¹ The Commission determined that this level of spectrum aggregation caused significant competitive concerns. The Commission also observed at the time that the "transfer of AWS-1 spectrum to Verizon Wireless would place it in the hands of a nationwide provider that has little incentive to provide the roaming capability necessary for competitors with less than national footprints."²² Since 2012, Verizon has acquired more spectrum and has fewer competitors, so the market is even less competitive and there is even less of an incentive for Verizon to provide reasonable roaming rates to its competition.

B. Unjustness and Unreasonableness of Rates

There are several measuring sticks by which we can assess the reasonableness of Verizon's voice and roaming rates. We can (i) compare them to Verizon's retail rates, (ii) we can compare them against Verizon's wholesale (MVNO) rates, and (iii) we can compare them against Verizon's costs, to the extent that we are able to project costs in the absence of Verizon's internal cost information.

²⁰ *In the Matter of Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses, Memorandum Opinion and Order and Declaratory Ruling, FCC 12-95, rel. August 23, 2012. ("SpectrumCo Order").*

²¹ *Id.* at ¶ 77.

²² *Id.* at ¶ 84.

1. Retail rates. Verizon offers numerous retail rate packages. In none of these packages does Verizon tell the consumer what she is being charged per minute of use or per gigabyte of data. This information is always buried in a bundle of activation fees, monthly charges, and limited or unlimited access to various service categories. We can, however, take a typical retail plan and assume the maximum usage of that plan's elements to develop a per element quarterly charge, and then compare that result against the roaming rate offered by Verizon to NTCH.

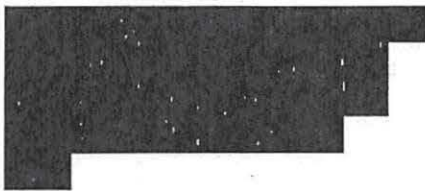
For this exercise, we selected the "Prepaid Smartphone \$45 Monthly Plan" which is set forth at pages 4 and 5 of Verizon's Response to Interrogatories. This plan provides the range of services being compared at one of the relatively low price points. This plan offers a monthly prepaid rate of \$45. It includes unlimited voice, toll and SMS service (three of the service categories desired by NTCH) and 1 GB of data. (1 GB is included in the basic rate and an additional 3 GBs can be purchased for \$20, and are good for up to 180 days.) There is also a onetime activation charge of \$35.00.

Since Verizon provided its roaming data in quarterly increments, we use a quarter of service for comparison. Since a roaming partner would normally use a high volume of minutes, we have assumed usage of the maximum number of voice minute possible in a quarter of the Plan. Under this Plan, a retail customer maximizing his use of voice minutes would pay:

Monthly access of \$45.00 x 3	\$135.00
Toll	\$ 0.00
SMS	\$ 0.00
129,600 voice minutes in a quarter	\$ 0.00
12 GB of data	\$ 60.00
<u>One time activation fee</u>	<u>\$ 35.00</u>
Total	\$230.00

Assuming based on the above that a GB of data is priced at \$5.00/GB, we can roughly attribute the remaining \$170 in quarterly charges by estimating that the volume of texts is about one-third the volume of voice minutes in a given month, per NTCH's typical customer use pattern. (NTCH Amended Complaint at p. 14). We also assign no separate cost to toll charges since these are negligible. Assigning the same fee to a text as to a minute of voice use, we have 129,600 MOUs + 43,200 texts = 172,800 units. These are then divided into \$170 to obtain the per unit price for texts and voice minutes. The result is a rate of \$0.098 per minute and per text, or about 1 cent a minute for voice. This rate obviously diminishes as the one-time activation rate is amortized over more quarters. This rate includes both Verizon's cost recovery and profit margin on the services delivered.

Of course, as noted above, unlike roaming rates, retail rates must cover the cost of advertising, stores, sales personnel, customer service, phone subsidies, detailed billing, and other costs associated with acquiring and sustaining customers. So the rate for roaming services should be significantly *less* than the rate provided to retail customers for the same bundle of services. But it is not. Instead, at Verizon's best offered rate, NTCH would have to pay this amount for the same services:



The roaming rate is therefore roughly [REDACTED] higher than the comparable retail rate. There is no conceivable justification for this difference in rates for effectively the same

services. Since the Commission has indicated in the data context that retail rates are a good metric for the reasonableness of rates, the same principle applies here.

2. MVNO Rates. The situation is almost as bad when we look at MVNO rates.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

3. Cost Data. Finally, in the absence of cost data directly from Verizon, NTCH has provided an independent cost-of-service analysis done by Paul Posner. Posner, a successful mobile services provider, calculated the costs of providing data roaming based on his own long and extensive experience in the industry.²⁷ His analysis calculated the cost of producing a GB of data as about \$2.20-2.40.²⁸ He also indicated that this figure was likely to be lower for a larger company which can distribute costs over a much larger

[REDACTED]

²⁷ Posner Affidavit at Exhibit P of Amended Complaint.

²⁸ *Id.* at p.3 and Attachment to Exhibit.

scale. A reasonable charge under the FCC's historical method of assessing reasonableness would therefore be about \$2.30/GB in costs, plus a reasonable rate of return of 8.5%²⁹ or about \$2.50 per GB of data. Verizon's offered [REDACTED] rate, which is [REDACTED] higher, is patently unreasonable on its face, while even NTCH's proposed \$5/GB rate is on the high side of reasonable since it involves a 100% margin.

C. Unreasonable Discrimination in Rates

As a result of discovery in this proceeding, it has been established that Verizon charges roaming rates to other carriers [REDACTED].³⁰ Similarly, it has been established that Verizon charges data roaming rates to other carriers [REDACTED]

[REDACTED]³¹ In addition, [REDACTED]

[REDACTED]

From a service-provision perspective, MVNOs are functionally the same as roaming partners.³⁴ An MVNO arrangement is one where a firm buys wireless services from a facilities-based carrier with the intent of reselling it to the public. The reason why such arrangements are relevant here is that the processing of calls or data usage by MVNO customers is functionally very similar to the processing of roaming calls. While there are minor differences in actual implementation due to the way roaming calls are

²⁹ Amended Complaint at fn. 13.

[REDACTED]

³⁴ See Amended Complaint at ¶¶ 28-30.

cleared and billed through a clearing house (in some but not all roaming agreements), the process basically involves allowing another entity's traffic to be carried over the facilities-based carrier's existing network without any of the costs to the facilities-based carrier associated with advertising for, signing up, billing, providing customer service, or otherwise establishing or maintaining the relationship with an end user. (Steinmann Declaration at p. 7)

A nationwide MVNO arrangement is therefore effectively a nationwide roaming agreement with no home area and no benefit to the economy or competition that comes with building and operating a home network. The chief difference is that NTCH's customers would not be roaming in the core areas of NTCH's second-tier operating cities where NTCH has existing networks, while an MVNO's customers would be using more of Verizon's capacity in these busier core sites.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Verizon has identified no cost or other factors which would justify a different rate between an MVNO and a roaming partner. The Commission has expressly held that MVNO rates are relevant when analyzing roaming rates because they are such similar services.³⁶

³⁶ *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, Letter Ruling, WT Docket 05-265, Released December 18, 2014 ("T-Mobile Order").

There is no cognizable basis for justifying the difference in rates charged to different carriers. While Verizon's discovery responses indicate that some of the carriers are members of its LRA program for rural carriers, [REDACTED]

[REDACTED]³⁷ Similarly, Verizon has provided [REDACTED]
[REDACTED], but the carriers being charged the higher and lower rates fall into both categories.

Once a Section 202 complainant establishes that a carrier is charging discriminatory rates, which NTCH has done here, the burden is on the respondent to justify the discrimination in price.³⁸ Verizon has steadfastly refused to offer any reason for the difference in these rates, meaning they are per se unreasonably discriminatory and commercially unreasonable.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

³⁸ *Supra*, note 7.

[REDACTED]

██████████ NTCH should be charged no more than the lowest rate charged by Verizon to any other carrier or MVNO.

D. Data Roaming

Data roaming has become a significantly more important component in wireless communications than when the cellular service was first introduced. Consumers now expect more than just voice telephony from their cell phone service provider – they expect internet access, multi-media messaging, and other services that require non-voice data service both when at home and when roaming.

NTCH is seeking a data roaming agreement for services that it itself provides in its home markets and that are fully technically compatible with Verizon's technical system. Provision of data roaming to NTCH would not impose any additional costs on Verizon to achieve technical compatibility.

The *Data Roaming Order* requires a review of the applicable factors outlined there.⁴¹ The *T-Mobile Declaratory Ruling* adds retail rates and wholesale rates as factors to consider in assessing reasonableness. It has already been established above that data roaming rate offered to NTCH by Verizon is between ██████████ than the comparable rate it offers its retail customers ██████████. The rate is also at least █ times higher than its cost of providing data roaming. The offered rate bears no relationship to Verizon's actual costs and is so prohibitively high as to effectively preclude its roaming partners from being able to offer data roaming to their customers when roaming on the Verizon system. These factors are so compelling in evaluating the

⁴¹ *Data Roaming Order* at Para. 86.

reasonableness of the rate that the other criteria pale in comparison. Nevertheless, let us examine the other factors cited by the Commission:

- *Whether Verizon has responded to the request for negotiation, whether it has engaged in a persistent pattern of stonewalling behavior, and the length of time since the initial request.* Verizon has not stonewalled.
- *Whether the terms and conditions offered by Verizon are so unreasonable as to be tantamount to a refusal to offer a data roaming arrangement.* The terms and conditions offered by Verizon are indeed so unreasonable. In today's marketplace, it is not practically feasible for carriers to pass through roaming charges incurred by customers when they roam, as was done in the early years of cellular service. When roaming charges are excessive, a customer's home carrier cannot afford to pay those charges because they would easily exceed the amount the customer is paying the home carrier. Charging an excessively high roaming rate is therefore the practical equivalent of offering no roaming at all. The home carrier must therefore block its customers' access to high-priced roaming carriers, leaving the customer with the choice of no service at all, spotty service from an alternative CDMA carrier, or the cumbersome process of manually setting up a roaming call with Verizon.
- *Whether the parties have any roaming arrangements with each other, including roaming for interconnected services such as voice, and the terms of such arrangements.* The parties do have a roaming agreement which specifies rates that are more than [REDACTED] times as high as the rates currently offered by Verizon. The existing rates are so excessive that NTCH cannot permit its customers to roam at that rate because the roaming fee would grossly be excessive relative to NTCH's flat rate fee structure.
- *Whether the providers involved have had previous data roaming arrangements with similar terms.* [REDACTED]
[REDACTED]

- *The level of competitive harm in a given market and the benefits to consumers.* The competitive harm to NTCH has been crippling. Not only must it compete against MVNOs [REDACTED], but its own customers are hampered in their ability to have ubiquitous service because they have no access to the Verizon network to roam on.
- *The extent and nature of providers' build-out.* NTCH explained that unless it can obtain a reasonable roaming rate with Verizon, it cannot offer a viable service in its home markets. It has therefore delayed commercial build-out of its facilities pending FCC action to compel reasonable rates. This approach is confirmed by the exit of Cricket and MetroPCS as independent players from the CDMA marketplace.
- *Significant economic factors, such as whether building another network in the geographic area may be economically infeasible or unrealistic, and the impact of any "head-start" advantages.* NTCH plans to build out facilities in its licensed territories once this case is satisfactorily resolved.⁴² The delay in the entry of a low cost competitor to Verizon's markets works directly to Verizon's advantage. It is therefore critical that this case be resolved soon to ameliorate the head-start advantages Verizon already enjoys.
- *Whether the requesting provider is seeking data roaming for an area where it is already providing facilities-based service.* NTCH is not seeking such roaming.
- *The impact of the terms and conditions on the incentives for either provider to invest in facilities and coverage, services, and service quality.* NTCH indicated that it can deliver mobile services at a lower cost to customers by building out its own facilities rather than by roaming on Verizon, even at the roaming rates sought in this complaint.⁴³ The availability of reasonable roaming therefore does not disincent NTCH to build out such facilities in its own markets. However, the unavailability of reasonable roaming rates in areas outside NTCH's home markets

⁴² Amended Complaint at 1.

⁴³ NTCH Consolidated Answer to Affirmative Defenses and Reply to Answer ("NTCH Reply") at p. 13.

makes it impossible for NTCH to offer a competitive product in its home territories.

- *Whether there are other options for securing a data roaming arrangement in the areas subject to negotiations and whether alternative data roaming partners are available.* As indicated above, Sprint is the only other nationwide CDMA carrier, and its network is neither as broad nor as deep as Verizon's. *Supra*, p. 12. In many areas, there is no alternative to Verizon as a CDMA roaming partner.
- *Events or circumstances beyond either provider's control that impact either the provision of data roaming or the need for data roaming in the proposed area(s) of coverage.* The consolidation of carriers into the big four nationwide providers has severely reduced roaming options for smaller carriers like NTCH.
- *The propagation characteristics of the spectrum licensed to the providers.* Not applicable. However, we note that virtually all of the sub-1 GHz spectrum which most efficiently covers rural areas is licensed to Verizon or AT&T, with virtually none held by Sprint, the other major CDMA carrier.
- *Whether Verizon's decision not to offer a data roaming arrangement is reasonably based on the fact that the providers are not technologically compatible.* Not applicable. Such compatibility is presumed.
- *Whether Verizon's decision not to enter into a roaming arrangement is reasonably based on the fact that roaming is not technically feasible for the service for which it is requested.* Not applicable. Technical compatibility is presumed.
- *Whether Verizon's decision not to enter into a roaming arrangement is reasonably based on the fact that changes to the host network necessary to accommodate the request are not economically reasonable.* Not applicable. Technical changes have not been requested.
- *Whether Verizon's decision not to make a roaming arrangement effective was reasonably based on the fact that the requesting provider's provision of mobile data service to its own subscribers has not been done with a generation of wireless technology comparable to the technology on which the requesting*

provider seeks to roam. Not applicable. Data roaming will only be sought for services available to NTCH's own subscribers.

- *Other special or extenuating circumstances.* See restraint of trade discussion below.

E. Restraint of Trade

As with excessive voice roaming charges, excessive data roaming rates stifle competition both by crippling Verizon's competitors' ability to offer consumers service that is realistically available when they are outside their home markets and by enabling MVNOs to effectively drive lower cost carriers from the market. It has already been established that Verizon holds a dominant position in the CDMA roaming market because of its unique coverage. This dominance of the market is effectively confirmed by the fact that it has been able to charge roaming rates well in excess of its costs ("monopoly rents", in economic parlance), a circumstance that under economic principles cannot occur over the long term unless there is a lack of effective alternatives.⁴⁴

This misuse of Verizon's monopoly power is reflected in two ways. First, a local or regional mobile services provider is in the unenviable position of competing with the national carriers for market share. Despite the imbalance of resources and advertising channels, many local and regional carriers are nevertheless able to survive by providing localized service, better rates, better customer service, or other methods that make their individualized product superior to the majors. NTCH's approach has been to target low income/bad credit customers who had traditionally been ignored by the major carriers. This is a viable business model because it fills a need unmet by the big companies.

⁴⁴ See, for example, *Qwest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 563 (Iowa, 2013)

However, as NTCH, Cricket, and MetroPCS all have found, the model requires access to reasonable roaming rates to be successful. No matter how superior the quality of the service offered by a small carrier in its own service area, customers demand that they be able to roam when they are *outside* the service area. If NTCH cannot offer its customers that ability to roam outside the home market, it cannot attract or retain customers in the long run.

This has been precisely the problem encountered by NTCH and other carriers. Without a reasonable roaming rate from Verizon, NTCH cannot offer or deliver a viable service product locally. In virtually every market in which NTCH operates or plans to operate, Verizon is a competitor. Hence, Verizon is able to cripple its localized competitor from gaining customers – even though the competitor may have superior coverage and service locally – simply by denying that competitor access to its roaming network. It uses its market power over roaming to restrain competition in the local market. This is a classic restraint of trade and a textbook violation of antitrust laws.⁴⁵ This strategy has driven numerous carriers from the market over the last five years and has directly deterred NTCH from being able to launch commercial service in many of the markets where it plans to offer competitive service.⁴⁶

The second way excessive roaming rates restrain trade is by allowing MVNOs like [REDACTED] to undercut independent competing carriers like NTCH. [REDACTED]

[REDACTED]

[REDACTED] This permits

⁴⁵ 15 U.S.C. § 2. *See, also Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993); *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966).

⁴⁶ *See* Steinmann Declaration attached to NTCH Reply.

██████████ to offer services ██████████, ██████████ which NTCH cannot offer its own customers. ██████████ and NTCH compete directly for the low income/bad credit customer base. By making it impossible for NTCH to compete against such an MVNO, Verizon can indirectly drive – and has driven – carriers out of the marketplace. This is called “predatory pricing by proxy” because Verizon effectively has the MVNO do the dirty work of wiping out competition while Verizon stands above the fray. When all such competition is eliminated, Verizon can either raise the rates it charges the MVNO or simply pull the plug on it completely. The result is that a source of real competition to Verizon is destroyed. Again, this is a classic antitrust violation.⁴⁷

The Commission has correctly declared that data roaming rates which restrain trade are not reasonable. As long as Verizon is allowed to charge excessive roaming rates to its competitors, real competition will be crippled to the severe detriment of consumers who are looking for alternatives to the overpriced, overcomplicated and over-constraining service offerings of Verizon. The Commission should recognize Verizon's practices for what they are and declare them unreasonable restraints of trade.

IV. Conclusions

The voice rate offered by Verizon to NTCH is unjust and unreasonable. It exceeds its cost of providing service by a wide margin, offering a rate of return far in excess of the 8.5%. It also exceeds benchmark retail rates by a wide margin, confirming that Verizon's costs must be well below the rate offered to NTCH. [REDACTED]

⁴⁷ Supra, n. 15.

[REDACTED] Even without establishing the actual costs that Verizon incurs in providing voice and data roaming service, it is clear that the particular rates offered here exceed any level that might be deemed reasonable by reference to Verizon's charges for the same services to other service users. The Commission should (i) declare any roaming rate charged to NTCH by Verizon above the rate requested by NTCH to be unjust and unreasonable under Title II of the Communications Act and (ii) it should open a full investigation of the cost structure of Verizon for roaming to ensure that a true cost-based rate is being charged to all of Verizon's roaming partners.

The voice and data roaming rates charged by Verizon are also unreasonable because they are intended to stifle competition by leveraging its dominance of the CDMA market to prevent competitors from offering viable roaming opportunities to their customers. Conduct that unreasonably restrains trade is not reasonable. *In the Matter of Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers* 26 F.C.C. Rcd. 5411 at 85 (2011); *Further Forbearance*, 13 FCC Rcd 16857 at 14 (1998).

The roaming rates offered by VZW are unjustly and unreasonably discriminatory because there is no technical or economic reason why the rate charged to NTCH should differ substantially from the rates offered to other carriers or to its own customers. Verizon has offered no justification for offering different rates to different carriers for identical services. Verizon may therefore lawfully charge NTCH no more than the

lowest roaming rate it charges another carrier, i.e., [REDACTED]

[REDACTED]⁴⁸

Finally, the data roaming rate offered by Verizon is not commercially reasonable under the totality of the circumstances. As with the voice rate offered by Verizon, the data rate is well in excess of its costs as measured by offerings to [REDACTED], and to its own retail customers. The factors identified in the *Data Roaming Order* almost without exception support a finding that the roaming rate has no commercially reasonable basis.

Four years that have gone by since NTCH sought a reasonable roaming rate from Verizon and two years have gone by since the instant Complaint was filed, Congress required complaints of this nature to be resolved in no more than five (5) months. 47 U.S.C. § 208(b)(1). NTCH therefore requests prompt action by the Commission to resolve this case.

Respectfully submitted,

NTCH, Inc.

By: /s/ Donald J. Evans

Donald J. Evans
Jonathan R. Markman

Its Attorneys

Fletcher, Heald & Hildreth, PLC
1300 North 17th Street, Suite 1100
Arlington, VA 22209
703-812-0400

September 18, 2015

⁴⁸ [REDACTED]

CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, do certify that I sent the foregoing INITIAL BRIEF OF NTCH, INC., on this 18th day of September, 2015, addressed to the following (by agreement of the parties) via email:

Andre J. Lachance
Verizon Wireless

Rosemary McEnery
Deputy Chief, Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission

Lisa Boehley
Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission

By: 
Michelle Brown Johnson